November 4, 2002

Ms. Carolyn Hanahan
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2002-6282

Dear Ms. Hanahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171632.

The Pasadena Independent School District (the "district"), which you represent, received a request for access to information concerning attorney's fee bills. You state that the district does not maintain some of the requested information.[1] You claim that other portions of the requested information are excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we must address the district's obligations under section 552.301 of the Government Code. When a governmental body receives a request for information that it wishes to withhold from disclosure but for which it does not have a previous determination, the governmental body must request a ruling from this office and state the exceptions that apply not later than the 10th business day after the date of receiving the written request. Gov't Code § 552.301(a), (b). Within fifteen business days of receiving the open records request, the governmental body must submit (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e).

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[1]It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to create or prepare new information. *See* Attorney General Opinion JM-672 (1987), H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986),416 at 5 (1984), 342 at 3 (1982), 87 (1975).

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The district initially received a request for information on July 24, 2002. On July 30 and August 2, the district sent the requestor estimates of charges for compiling the requested information in accordance with section 552.2615. *See id.* §§ 552.2615 (requiring governmental body to provide requestor with estimate of charges when request to inspect paper record will result in imposition of charge that will exceed forty dollars), .271 (providing that governmental body may charge for anticipated personnel costs for making available for inspection information that exists in paper records only if information specifically requested is older than five years or will completely fill six or more archival boxes and more than five hours will be required to make information available for inspection). The deadlines imposed by section 552.2615 did not affect the district's deadline for requesting a decision from this office. *See id.* § 552.2615(g). However, the district did not request a decision from this office until August 30–a date well beyond the required deadlines. Thus, the district failed to comply with the procedural requirements of section 552.301.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.–Austin 1990, no writ); *see* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests); *see also* Open Records Decision No. 630 (1994). You claim that some of the submitted information is excepted under section 552.103. This section, which excepts from disclosure information relating to litigation, is a discretionary exception that protects the governmental body's interests and may be waived. As such, section 552.103 does not provide a compelling reason to overcome the presumption of openness. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). However, because you also claim that portions of the submitted information are excepted under section 552.101, we will address those arguments.

We also note that the requested information is subject to section 552.022 of the Government Code, which provides that

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

. . .

> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022(a)(16) unless it is expressly confidential under other law. You assert that portions of the fee bills are confidential by law and protected by the attorney-client and work product privilege. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found in Texas Rule of Evidence 503, and the work product privilege is found in Texas Rule of Civil Procedure 192.5. Therefore, we will consider whether the information you seek to withhold is confidential.

You assert that portions of the submitted fee bills refer to students of the district and therefore constitute education records. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decsion." This section encompasses confidentiality statutes such as the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Public Information Act in accordance with FERPA. In addition, section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and

(2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Accordingly, we conclude that information contained in the requested documents that personally identifies particular students must be withheld.

You also contend that portions of the submitted documents are protected by common law privacy. Section 552.101 of the Government Code also encompasses the common law right of privacy, which excepts from disclosure information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). You have not identified the particular information that you contend is protected by common law privacy. *See* Gov't Code § 552.301(e)(2)(governmental body must label information to indicate what exceptions apply to what parts). Furthermore, having reviewed the submitted information, we find nothing that is protected by common law privacy. Accordingly, none of the submitted information may be withheld pursuant to section 552.101 on the basis of common law privacy.

We now address your arguments regarding the attorney-client and work product privilege. Texas Rule of Evidence 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> >
> > (B) between the lawyer and the lawyer's representative;
> >
> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You have marked portions of the fee bills that you state "recite communications that were made either to (1) employees with authority to obtain professional legal services and that were made during the course and scope of those employees' duties, (2) employees or representatives with factual information inherently necessary to the provision of legal advice to the District, or (3) to a lawyer or representative representing another party in a pending action." In marking the fee bills, you have not indicated which of the communications were made with clients and which were made with third parties, nor have you provided us with a list of the attorneys and clients involved. You do not assert that the communications with other parties in pending actions were made "concerning a matter of *common interest* therein." Tex. R. Evid. 503(b)(1)(C); *see also In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.–Waco 1998, no pet.) (discussing the "joint-defense" privilege incorporated by rule 503(b)(1)(C)). Furthermore, the documents themselves indicate that some of the communications you seek to withhold were made with parties that were opposing the district in the pending matters. Consequently, we are unable to conclude that most of the marked information is excepted. Having reviewed the submitted information, the only privileged parties we are able to

identify are attorneys Carolyn Hanahan and David M. Feldman and district representatives Rick Schneider, Bill Kielman, and Ms. Meynier. Accordingly, only the information we have marked may be withheld pursuant to rule 503. *See Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

You also contend that portions of the attorney fee bills are protected by the attorney work product privilege. An attorney's work product is confidential under rule 192.5. Work product is defined as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

Although you quote the standard from rule 192.5, you do not represent that the information you have marked was created for trial or in anticipation of litigation. We therefore conclude

that you have not shown that any of the information is protected by the attorney work product privilege under rule 192.5, and none of it may be withheld on that basis.

In summary, information in the submitted fee bills that personally identifies students must be withheld under section 552.101 in conjunction with FERPA. We have marked those communications that may be withheld pursuant to rule 503. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID#171632

Enc. Submitted documents

c: Ms. Doris Barnes
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Pasadena, Texas 77504
(w/o enclosures)